No. 89-1279

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1989

**PACIFIC MUTUAL LIFE INSURANCE COMPANY,**

Petitioner,

vs.

**CLEOPATRA HASLIP, CYNTHIA CRAIG, ALMA M. CALHOUN and EDDIE HALGROVE,**

Respondents.

On Petition for Writ of
Certiorari to the
Supreme Court of Alabama

# BRIEF OF MID-AMERICA LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING THE POSITION PETITIONER

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## INTEREST OF MID-AMERICA LEGAL FOUNDATION

Mid-America Legal Foundation (MALF) is a non-profit Illinois corporation. MALF has an interest in the disposition of the case which is before this Court on writ of certiorari to review the judgment and opinion of the Alabama Supreme Court in Pacific Mutual v. Cleopatra Haslip, 553 So. 2d 537 (1989), based on the expertise and purpose of this organization.

MALF was organized in 1975 to engage in legal research, study and advocacy for the benefit of the general public. MALF takes special interest in issues of national scope that have a direct impact on the Midwest region, namely Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio and Wisconsin.

The Midwest region is one of the most important manufacturing areas of the nation. The question of punitive damages has a great impact on our nation's producers in that

they frequently are subjected to punitive awards in products liability lawsuits. For example, it is possible for one alleged design defect in a product to bring multiple punitive awards, a result which has developed relatively recently with the evolving tort law of our times.

Punitive awards were once limited to cases in which an individual had conducted himself in such an egregious manner as to deserve special monetary damages being awarded against him. Today, punitive awards are being allowed more and more frequently against corporations, and as such there is no particular individual to be "punished" except the shareholders as a group, or their insurers.

MALF is able to give this Court a perspective from the point of view of the Midwestern states, comparing the law in those states with the situation at bar, and commenting on the economic impact this case

may have on the Midwestern region as a whole.

MALF is an advocate of the free enterprise system, and of individual rights as opposed to excessive government control. Punitive damages as applied in the instant case have a direct effect on the ability of American producers to compete on the world market as our courts are functioning in a totally unpredictable manner, akin to a lottery, in determining the amounts of tort awards for injured plaintiffs. Government, acting through the courts, is effectively crippling American industry.

Punitive damages as applied in Alabama and in other states are a serious problem, jeopardizing large corporations, as those are usually the principal target of those seeking large punitive damage awards. But in addition, punitive damages are hurting America's social welfare, in that American producers are placed at a disadvantage as

compared with foreign producers. The result is a loss of jobs and lifestyle in America.

MALF has obtained the consent of both parties to the filing of this brief, copies of the letters being on file with the Clerk of this Court or being sent to the Clerk by counsel for the parties.

## SUMMARY OF ARGUMENT

This Court has never applied the 14th Amendment to the system by which punitive damages are applied in many states. Browning-Ferris Industries v. Kelco Disposal, Inc. 492 US __, 109 S. Ct. 2909 (1989).

Until relatively recently, punitive damages were awarded only in certain unusual cases involving individual turpitude or purposeful malicious behavior on the part of the defendant. However, in the last 20 years or so, punitive damages have been

applied on a far more widespread basis. The focus of such damages has shifted from individuals and has increasingly targeted corporations. In many cases, plaintiffs are permitted to argue that the size of the corporation is in itself a reason to grant a large punitive award.

The changing focus of punitive damages has resulted in a system which more resembles a lottery than a court of law. Instead of a legal system in which citizens can know in advance what to expect under the law, the system of punitive damages as it is applied today merely introduces a large element of chaos and uncertainty into the dispute resolution process. As a side effect of the court-imposed chaos, private insurance for liability becomes increasingly expensive as insurers cannot accurately predict risks for purposes of assessing premiums.

Rather than serving its original purpose of deterring unconscionable conduct,

the punitive damages system as applied today merely introduces a wildcard into the legal process, an arbitrary and unfair confiscation of property, clearly violative of the 14th Amendment to the Constitution.

**ISSUE**

Are punitive damages, as applied in this case, violative of the 14th Amendment Due Process Clause to the U.S. Constitution?

**ARGUMENT**

Though punitive damages have been around for generations, this area of the law has practically exploded in recent decades. Under old tort law, punitive damages were allowed only when the defendant had acted outrageously or with wanton disregard of the plaintiff's safety. Such awards were directed against individuals for their own

misconduct, not against the employers of wrongdoers or against corpo. ations.

As a trend, plaintiffs are seeking punitive damages in more types of situations and against more defendants. The numbers of such cases and the amounts of the verdicts have skyrocketed in recent years.

As Peter W. Huber points out in his book, Liability, The Legal Revolution and Its Consequences, the explosive growth of punitive damage awards has completely altered the tort landscape.

> "Demands for punitive damages were extremely rare until the 1960's; today they are routine when the injury is serious and a wealthy institution is numbered among the accused. ... Before 1970, for example, only about 0.5 percent of all tort claims filed against Ford Motor Company asked for punitive damages; by 1975 such demands had risen tenfold; and by 1980, punitive awards were being sought in more than a quarter of all cases."
>
> Huber, supra, at page 127

The reason for the punitive damage explosion is obvious. It raises the stakes

in the tort system by introducing a totally open-ended factor-- a jury license to award, as in the case at bar, literally any amount of money out of thin air.

The totally arbitrary nature of punitive awards can be demonstrated by the results in products liability cases, where a manufacturer may be subjected to exemplary penalties multiple times for the same product.

> "Out of eleven early cases against MER/29 [an anti-cholesterol drug], the manufacturer won four, the plaintiff won only compensatory damages in four, and the plaintiff won punitive damages in three-- one of which was then overturned on appeal."

Huber, supra, at page 110

Currently 29 of the 50 states specifically provide for punitive damages in one form or another, according to a study by the University of Miami Law and Economics Center. The results of that study were published in the Triodyne, Inc. Safety Brief, March, 1990, illustrating the crazy-quilt nature of tort law from one state to the next.

There is enormous variation as to punitive damages among the Midwestern states.

Ohio allows punitive damages, but the judge determines the amount to be paid.

In Wisconsin, the leading case involves a landowner who paid punitive damages to an injured tenant because of someone else's criminal act on his property. Brown v. Louis Maxey, 124 Wis. 2d 426; 369 N.W. 2d 677 (1985). The defendant, who owned a federally subsidized housing project, was ordered to pay punitive damages for a fire which was set deliberately by a relative of a tenant. The Brown court observed that the landlord's behavior, though not malicious or purposeful, was "outrageous" in that he should have taken steps to avoid the possibility of arson--such as "more thorough tenant selectivity." Brown, supra, 369 N.W. 2d at 683.

It is interesting that the Wisconsin court allowed punitive damages against this defendant for a fire he did not set. If the

defendant's conduct was criminal in some sense, presumably the fire marshal could have issued a citation or sought criminal prosecution; however the Wisconsin civil judges felt it within their province to provide the punishment, by adding punitive damages to the compensation this defendant was otherwise liable for.

The Brown case also stands for the principle that punitive awards are covered by insurance in Wisconsin. Not all states follow that practice, though, usually on policy grounds that punitive damage awards are to punish, and so insurance coverage for them would defeat the purpose. (1)

Contrast the Wisconsin situation with Michigan's, where landowners are not responsible for crimes by others in the first place. Williams v. Cunningham Drugs, 429 Mich. 495; 418 N.W. 2d 381 (1988). Nor are

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(1) Compare: the U.S.S.R. prohibits liability insurance for negligence, on policy grounds. It is felt that personal responsibility for tort deters negligent behavior.

punitive damages allowed under Michigan common law, since plaintiffs are considered fully compensated by their recovery for non-economic damages. Vaselenak v. Smith, 414 Mich. 567; 327 N.W. 2d 261 (1982).

Iowa allows punitive damages, but the system is tightly controlled by statute. See Iowa Code Annotated, §668A.1. Iowa plaintiffs may receive only 25 percent of the punitive award unless it can be proven that the defendant directed his conduct specifically at the claimant. The remainder of the award is paid to a state fund for uninsured litigants, which has the salutary effect of preventing undeserved windfalls to plaintiffs. That provision may, however, put the statute in jeopardy of an 8th Amendment constitutional challenge pursuant to Browning v. Kelko, supra.

Illinois has a statutory provision allowing the judge to apportion punitive damages among the plaintiff, plaintiff's

counsel, and the Illinois Department of Rehabilitation Services. See Ill. Rev. Stat. ch. 110, § 2-1207. Though that provision may be violative of Browning, supra, it was part of a 1986 reform package which parallels Iowa's provision in that respect.

Illinois is somewhat liberal in awarding punitive damages, applying a standard which is not sharply distinguishable from that of negligence. The test is "willful and wanton conduct" which can be proven without showing any specific intent to injure. See Moore v. Jewel Tea Co., 46 Ill. 2d 288, 263 N.E. 2d 103 (1970).

The legislature in Minnesota recently grappled with the danger of allowing unbridled punitive awards, and took steps to cut back some of the more blatantly unfair aspects of the system. Compare Minnesota Statutes Annotated, 549.20, with § 555.15-18.

Minnesota law is interesting in that it

addresses certain abuses of the punitive damages system which are evident in the case at bar.

The newly revised statute, M.S.A 555.15 et. seq., permits a party bifurcation of the trial where the issue of punitive damages has been raised. Bifurcation eliminates the problem of inflammatory evidence being introduced during the trial in chief, such as the wealth of defendant, which may well influence the jury's assessment of the compensatory damages issue.

Minnesota has addressed the problem faced by subsequent plaintiffs when the first claimants, through use of punitive damages, have dried up the source of compensation for future litigants, as happened in the instance of Searle and its IUD litigation. A Minnesota defendant is permitted to introduce evidence at trial showing its liability to other plaintiffs, in an effort to reduce the punitive award. That provision is seldom

used by defendants, though, as its negative impact on the jury could well outweigh any benefit it might have to the defendant.

The fact that Minnesota has dealt with the problem legislatively is evidence that the Minnesota legislature has perceived the basic unfairness of unbridled punitive damages, and without analyzing it as a due process question has attempted to mitigate some of the more harmful aspects of the punitive damages system.

## CONCLUSION

The procedure for application of punitive damages in Alabama, as shown in the case at bar, has clearly evolved into an oppressive and arbitrary system which effectively turns the courtroom into a gambling casino. This insurance company could not by any stretch of the imagination have intended the harm to plaintiffs, nor even had advance knowledge of the harm. The Alabama court

would nevertheless subject it to an award which bears no relation whatsoever to the "crime" of its employee. Rather, the jury was given the opportunity to vent its prejudice against big business and its frustration against insurance companies in general; all of which serves no legal, judicial, or social purpose.

This Court has the opportunity to rule, once and for all, that punitive damages as applied in this instance are in fact a violation of the 14th Amendment to the Constitution of the United States.

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